Comment: “We are concerned that this variance procedure will give industries a way around the Clean Water Act. It seems that the procedure has proposed risks, ignore cleaning up the pollutant source, and instead simply draft a variance to get around the problem. What will happen to the original source of the pollutant? Would it ever be addressed and cleaned up? The variance process should in no way detract from the urgency of addressing legacy pollution.”

EPA Response:
WQS variances are not a way around the Clean Water Act. The goal of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. The purpose of a WQS variance is to allow states and authorized tribes the ability to make incremental progress toward attaining designated uses that are not currently attainable but may be attainable in the future. When used appropriately, WQS variances can provide a regulatory mechanism to improve water quality when a designated use cannot be attained in the near term, but a state or tribe wants to maintain the designated use as a long term goal. All WQS variances must comply with the regulations at 40 CFR § 131.14. The regulations at § 131.14 include several requirements to ensure that WQS variances facilitate the restoration of water quality rather than serving as a mechanism to lock in status quo.

Comment: “The proposed rule states… ‘The interim effluent condition that reflects the greatest pollutant reduction that is achievable,’… The BER needs to make clear that this requirement means that the best available technology will be applied before a variance is ever considered.”

EPA Response:
The phrase best available technology (BAT) is used in effluent guidelines regulations to refer to wastewater treatment technologies that are economically achievable for particular categories or classes of industries. Instead, 40 CFR § 131.14 uses the term “highest attainable condition” to refer to the condition of a waterbody or effluent that is both feasible to attain and closest to the underlying designated use and criteria. If a WQS variance is justified on the basis of economic feasibility, then the WQS variance must specify a highest attainable condition that represents the highest water quality achievable through pollutant control technologies and other feasible pollutant reduction requirements without incurring costs that would cause substantial and widespread economic impacts.

Comment: “Part of the discharge permit requires that nondegradation must be evaluated. Nondeg requires that you cannot increase the flow in a water body by more than 15%. If the discharger is increasing the flow in the stream, it will push pollutants downstream more quickly and farther.”

EPA Response:

This rule has no effect on the state’s implementation of the state’s nondegradation policy. The regulation at 40 CFR § 131.14(b)(1)(ii) prohibits a WQS variance from resulting in any lowering of the currently attained ambient water quality (except in the rare circumstance where a WQS variance is necessary for the purpose of facilitating lake, wetland, or stream restoration through dam removal or other significant reconfiguration activities). Therefore, a variance that meets the requirements in 40 CFR § 131.14 should not involve degradation of ambient water quality.